Supreme Court, U.S.
FILED

03 367 SEP 3 2003

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

DANIEL TURNER,
PETITIONER

v.

HOUMA MUNICIPAL FIRE AND POLICE CIVIL SERVICE BOARD, ET AL
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

RONALD L. WILSON (#13575)
210 Baronne Street
Suite 1800
New Orleans, Louisiana 70112
PH: (504) 525-4361
FAX: (504) 525-4380
E-mail: cabral2@aol.com

COUNSEL FOR PETITIONER

Riverside Printing, L.L.C., 4939 Tchoupitoulas, N. O., LA 70115, (504) 897-5000

60 pp

QUESTIONS PRESENT FOR REVIEW

Whether the requirement of the Fifth Circuit Court of Appeals that Petitioner exhaust his procedural due process claims in state court was contrary to this Court's holding in *Parratt v. Taylor,* 101 S.Ct. 1908 (1981)?

DESIGNATED LIST OF ALL PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

Daniel Turner - Petitioner

Pat McKey - Civil Service Board member/Respondent

Timothy Wallace - Civil Service Board Member/Respondent

Johnny Lopez - Civil Service Board member/Respondent

Joe Roy - Civil Service Board member/Respondent

David Falgoust - Civil Service Board member/Respondent

Craig Landry - Civil Service Board member/Respondent

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW.....i

DESIGNATED LIST OF ALL PARTIES TO THE PROCEEDINGS IN THE COURT BELOW.....ii

TABLE OF CONTENTS.....iii

TABLE OF AUTHORITIES.....v

OPINIONS BELOW.....1

JURISDICTIONAL STATEMENT.....1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....2

STATEMENT OF THE CASE.....2

Statement of Facts.....4

REASONS FOR GRANTING THE PETITION.....17

ARGUMENT

Petitioner was afforded a predeprivation hearing pursuant to state law. However, the hearing was a mockery - a sham. It resulted in a denial of due process. *Parratt* does present a bar to the litigation of that claim in federal court.....17

CONCLUSION.....22

TABLE OF CONTENTS (cont.)

Page

APPENDIX

Judgment of the Fifth Circuit Court of Appeals.....A-1

Judgment of the United States District Court
for the Eastern District of Louisiana.....B-1

Judgment of the United States District Court
for the Eastern District of Louisiana
(Aug. 30, 2002).....C-1

TABLE OF AUTHORITIES

CASE Page

Adams v. Sewell,
946 F.2d 757 (11th Cir. 1991).....21

Aetna Life Insurance Co. v. Lavoie,
106 S.Ct. 1580, 1590 (1986).....19

Babst v. Hartz
181 So.2d 871 (La. 1926).....6

Bland v. City of Houma,
264 So.2d 729 (La.App. 1st Cir. 1972).....4

Cathey v. Guenther,
47 F.3d 162, 164 (5th Cir. 1995).....17

Daniels v. Williams,
720 F.2d 792, 796 n.3 (4th Cir. 1983),
aff'd 106 S.Ct. 692.....18

Grimes v. Nottaway County School Board,
462 F.2d 650 (4th *Cir.), cert. denied,*
409 U.S. 1008, 34 L.Ed.2d 300, 93 S.Ct.
439 (1972).....21

Hudson v. Palmer,
468 U.S. 517, 533 (1986).....17

In re Murchinson,.
75 S.Ct. 623, 625 (1955).....19

Keneally v. Lungren,
967 F.2d 329, 333 (9th Cir. 1992).....19

Levenstein v. Salafsky,
164 F.3d 345, 351 (7th Cir. 1998).....21

Marshall v. Jerrico, Inc.,
100 S.Ct. 1610, 1613 (1980).....19

McKinney v. Pate,
20 F.3d 1550 (11th Cir. 1994).....21

Miller v. City of Mission,
705 F.2d 368, 372 (10th Cir. 1983).....19

Patrick v. Patrick
227 So.2d 162 (La. 1969).....6

Parratt v. Taylor,
101 S.Ct. 1908 (1981).....*Passim*

Ryan v. Illinois Dept. of Children and Family Services,
185 F.3d 751 (7th Cir. 1999).....21

Stivers v. Pierce,
71 F.3d 732, 747 (9th Cir. 1995).....20

Turner v. Houma Mun. Fire & Police Civ. Ser. Bd.
229 F.3d 478 (5th Cir. 2000).....3

Withrow v. Larkin,
95 S.Ct. 1456, 1464 (1975).....19

Constitution and Statutes

Page

U.S. Const. Amend. XIV (Due Process Clause).....2

42 U.S.C. § 1983.....2

28 U.S.C. § 1257(a).....1

LSA-R.S. 33:2501(B)(1).....8,9

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2003

DANIEL TURNER,
PETITIONER

V.

HOUMA MUNICIPAL FIRE AND POLICE CIVIL SERVICE BOARD, ET AL
RESPONDENTS

PETITION

Daniel Turner petitions for a writ of certiorari to review the final judgment of the United States Court of Appeals for the Fifth Circuit on June 6, 2003.

OPINIONS BELOW

The opinions of the Court of Appeals (02-30984 Pet. App. 1-a) and the District Court (99-CV-152-A Pet. App. 4-a) are not reported.

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on June 6, 2003. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The 14th Amendment of the Untied States Constitution provides, in pertinent part, as follows:

> No state shall ... deprive any person of life, liberty, or property, without due process of law.

> 42 U.S.C. §1983 provides, in pertinent part, as follows:

> Every person who, under color of any statute ... Of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

STATEMENT OF THE CASE

The Proceedings Below

This case was brought pursuant to 42 U.S.C. § 1983, to redress Petitioner's rights secured by the Fourteenth Amendment to the United States Constitution. Petitioner contended that Respondents violated his right to Due Process and Equal Protection of the Law, as guaranteed by the 14th Amendment to the United States Constitution.

The District Court granted in part, and denied in part, a Motion to Dismiss and/or for Summary Judgment filed by Respondents. The motion was granted as to Respondent board members in their individual capacities, and denied as to those claims against them in their official capacities.[1]

Respondents filed a second Motion to Dismiss and/or for Summary Judgment, which was denied by district court. A third Motion to Dismiss was filed by Respondents, which was likewise denied by the District Court.[2]

Respondents filed a fourth Motion for Summary Judgment, which was granted by the district court.[3] The district court found that Petitioner failed to prove racial discrimination. Petitioner appealed three issues: (1) whether the trial judge erred in permitting the filing of a dispositive motion after the expiration of the deadlines, (2) whether there was a general issue of material fact that the predetermination hearing was a sham, thereby precluding summary

---

[1] The decision was affirmed on appeal. *See Turner v. Houma Mun. Fire and Police Civil Service Board,* 229 F.3d 478(5th Cir. 2000).

[2] Respondents raised various contentions: (1) Petitioner failed to exhaust remedies pursuant to state law, (2) Petitioner's claims were barred by state law, and (3) the district court should abstained, pending a resolution of the state court claims. All of said contentions were rejected by the district court.

[3] Actually, the Motion for Summary Judgment was untimely. The scheduling ordered entered on January 8, 2002, required that all pretrial motions, particularly dispositive motions, be filed and served in sufficient time to be heard at least forty-five days prior to trial. Since the trial was scheduled for September 16, 2002, it was necessary for Respondents to file and serve its motion so that it could be heard forty-five (45) days prior to September 16, or by August 2, 2002, at the latest.

judgment, and (3) whether there was sufficient evidence presented on the question of whether was treated differently because of his race, creating a general issue of material fact.

On June 6, 2002, a panel of the Fifth Circuit affirmed the decision of district court, finding that: (1) the district court did not err in allowing Respondents to file their fourth dispositive motion, (2) Petitioner was precluded from pursuing his procedural due process claims, since he failed to exhaust them on the state level, and (3) no similarly situated individual engaged in conduct similar to Petitioner and was not punished in a similar manner. Further, the court found that a Caucasian fire chief was fired for committing acts for which Petitioner had been suspended.[4] This petition followed.

Statement of Facts

Petitioner herein in Daniel Turner, an African American male of full age of majority and domiciled in the parish of Terrebonne, State of Louisiana. He commenced his employment with the Houma Fire Department on May 1, 1968, in the capacity of fireman. He was promoted to the positions of fireman, fireman 1st class, driver and captain on April 1, 1969, December 1, 1969, September 1, 1970, and May 5, 1971, respectively. On November 22, 1993 Petitioner became permanent in the position of district fire chief. He was promoted to the position of assistant fire chief on February 5, 1996, and provisional fire chief on July 1, 1997, pending appointment of a permanent fire chief.

---

[4] *See Bland v. City of Houma,* 264 So.2d 729 (La.App. 1st Cir. 1972). There was a thirty year gap in the two incidents.

Petitioner, through hard work and dedication, stood on the verge of becoming the first African American fire chief for the City of Houma, requiring only the appointment by the parish president, and confirmation by the parish council, to make it official. Unbeknownst to Petitioner, a group of Caucasian fire fighters, together with the cooperation and/or approval of certain members of the Houma Municipal Fire and Police Civil Service Board ("Board"), and counsel for said Board, were working to derail Petitioner's appointment and confirmation.

On July 20, 1997 Petitioner appeared at a meeting of the Board requesting an amendment of the classification plan, removing the requirement that an individual serve two years as a captain prior to being allowed to qualify for fire training officer and fire inspector. Petitioner requested that the proposed changes be posted for thirty days, after which time a hearing could be held by the Board. Posting of the proposed changes would have resulted in the rescheduling of the tests, which were scheduled for September 16, 1997. The Board requested that Petitioner submit his proposal in writing and agreed to take it up after the scheduled tests. In support of his request, Petitioner submitted a letter from Paul K. Daly, State Examiner, who stated that "in no instance does a qualification requirement for the classification of Fire Inspector or Fire Training Officer require as a criterion for admission to these competitive examinations, time-in-grade of Fire Captain." Further, Petitioner submitted the letter requested by the Board, containing his proposal.

On September 11, 1997 the Terrebonne Parish Consolidated Government filed a petition for injunction, seeking to enjoin the examination scheduled for September

16, 1997. Petitioner was not a party to this action. A temporary restraining order was entered by Judge Walker, requiring the Board to show cause why a preliminary injunction should not issue. A petition for intervention was filed on behalf of Daniel Scott, Brian Hebert and David Lopez, Caucasian captains on the Houma Municipal Fire Department, by Douglas H. Greenburg, attorney at law.[5] After the hearing, Judge Walker dissolved the temporary restraining order.

---

[5] It is important to note that the proceeding before Judge Walker, which was originally filed as a Petition for Injunctive Relief, which is summary in nature, was for all practical purposes, upon the intervention by the Caucasian fire fighters, converted to an ordinary proceeding. In the prayer for relief, interveners sought, *inter alia*, "damages, as any be found in the premises.... attorney's fees [and] for all costs incurred in this matter and for all other general and equitable relief." In so praying, said Caucasian officers injected a moneyed demand into a summary proceeding, something "to which [they] [are] not entitled to extraordinary relief, but only relief in the ordinary course." *Babst v. Hartz,* 181 So.2d 871 (La. 1926).

The court did not have the jurisdiction to entertain the relief sought by the Caucasian officers. "Art I of the Code of Civil Procedure defines jurisdiction as the legal power and authority of a court to hear and determine an action. * * *. [I]n order for the court to have the legal power to decide ordinary proceedings there must be a petition (CCP 421), and answer (CCP 852) or default judgment (CCP 1701 - 1703, 1843) and a regular setting of the case for trial according to court rules with due notice of the setting to the parties (CCP 1571 (1)) *Patrick v. Patrick,* 227 So.2d 162 (La. 1969)

In the case at bar, the Caucasian police officers were allowed to intervene on the day of the hearing on the motion for preliminary injunction; they were allowed to press a claim for, and were in fact awarded, monetary damages, no answer was filed with respect to the intervention, and there was no due notice to the parties that the damages claim would be tried that day.

Further, Petitioner was made the focal point of the interveners attacks. He walked into an "ambush." He was not represented by counsel. Had the matter been placed on the regular trial docket, Petitioner would have been allowed to retain counsel and conduct discovery to

At the Board meeting on October 14, 1997, Board members Lieutenant Lopez and Captain Wallace moved and seconded, respectively, that a letter be forwarded to the parish president requesting an evaluation of Petitioner within ten (10) days, with the threat that a failure to do so would result in the Board taking appropriate action under the law. The motion carried with one member, Reverend Allen, the only African American board member, abstaining. Petitioner was placed on administrative leave, on November 12, 1997. The administrative leave was terminated effective November 21, 1997 at 4:00 p.m., with no disciplinary action being taken against Petitioner.

On November 17, 1997, the very same day that Judge Walker denied the request of the Terrebonne Parish Consolidated Government for injunctive relief, and while Petitioner was still on administrative leave, Oswald Stoufflet, Caucasian captain with the Houma Fire Department, filed a complaint with Board, stating:

> On November the 10th and 11th, I was involved in two confrontations with Acting Fire Chief Daniel Turner. On both of these occasions I believe that I was treated by Acting Chief Turner in a manner unbecoming to his position and to me personally.
>
> In light of recent acts by Acting Chief Turner towards other members of the Houma Fire Department and subsequent court findings regarding these acts I respectfully request an investigation into his actions towards me.

(footnote 5 continued)
defend against the unfounded and unactionable allegations of the interveners. Since he was not provided such an opportunity, Judge Walkers findings with respect to him should carry no weight.

The Board scheduled a hearing for January 6, 1998, on Mr. Stoufflet's letter. At no time prior to the hearing did the either the Board or its attorney provide Petitioner with written notice of the hearing date,[6] a specification of the charges being brought against him, list of the witnesses to be called and the evidence to be introduced.

Prior to a hearing on Stoufflet's ambiguous complaint, the Board, on November 18, 1997, held a hearing on a complaint filed against Petitioner by Todd Rhodes, Caucasian fire equipment operator. Mr. Rhodes refused to accept a position of acting captain and, as a result thereof, Petitioner reassigned him to a floating position. Mr. Rhodes perceived this to be a threat. The Board ruled against Mr. Rhodes, finding that "based on the evidence presented and lack of disciplinary actions as per the Civil Service Statutes between Mr. Rhodes and Mr. Turner the Civil Service Board will decline to take action in this matter."

The hearing on the Stoufflet matter was held on January 6, 1998, as scheduled. The hearing was conducted by counsel for the Board, Robert Cuccia, and not defendant, Pat McKey, the chairperson of the Board. This is evidenced by the following language from the minutes of the meeting:

> The [sic] Cuccia asked the witness if he was asking the Board to act because, based on the facts presented, because the Parish Government has not taken action against Daniel Turner given ample time and opportunity to do so and has failed to do so?

---

[6] LSA-R.S. 33:2501 (B)(1) requires the Board to provide Petitioner with written notice of the date, time and place of the hearing at least 10 days in advance thereof. The Board failed to do so.

It is patently obvious from the foregoing comment by Mr. Cuccia that Petitioner was convicted prior to the hearing.

The Board reconvened on January 8, 1998, and Lt. Lopez[7] moved, seconded by Captain Wallace, that Petitioner be suspended without pay for thirty (30) days, beginning at 8:00 a.m., Wednesday, January 9, 1998. Reverend Allen abstained. Lt. Lopez moved, seconded by Captain Wallace, that a, copy of the recorded tapes of the hearing be forwarded to the office of the District Attorney. The reasons for the Board's decision were not reduced to writing.

By certified mail dated January 24, 1998, Petitioner filed a timely appeal of the Board's decision, stating:

> a. The hearing was held in violation of LSA-R.S.33:2501(B)(1), which provides that "[n]o hearing and investigation shall be held unless both the employee and appointing authority have been advised at least ten days in advance of the date, time, and place therefor." Petitioner was not advised of the date, time, and place of the hearing **at least 10 days** in advance thereof

---

[7] Clearly, Lt. Lopez should have recused himself from the proceedings. His brother, David Lopez, alleged during the hearing on the injunction, on October 8, 1997, that Petitioner had violated his rights in ordering him to submit to a drug test. Testifying at said hearing, Lt. Lopez stated that he felt that Petitioner was going to give his brother "the shaft." Further, he testified that when he received a telephone call advising him of his brother's problem, he believed that Petitioner was attempting to use his brother to influence him, in his capacity as a Board member. *See* "P-12", Trial Transcript.

b. The decision was contrary to the law and the evidence, for Petitioner did not threaten or commit any act of misconduct respective to Captain Oswald Stoufflet.

c. Several of the Board members were, and presently are, biased against Petitioner, thereby preventing him from having a fair hearing: 1) Chairperson McKey has attended and/or participated in *ex parte* meetings and/or communictions with firefighters opposed to Petitioner during which they stated their desire to prevent him from becoming permanent in the position of fire chief; she has publicly stated that whatever the majority of the firefighters want, she is in favor of it. The majority of the firefighters want ed Petitioner to be found guilty of said baseless charge, because it would reduce his chances of becoming the permanent fire chief; and, she testified against Petitioner at the hearing on the request for a preliminary injunction; 2) Police Lieutenant Johnny Lopez is the brother of Fire Captain David Lopez, who himself has lodged several allegations and/or complaints against Petitioner, he testified against Petitioner at the hearing on the motion for preliminary injunction st. ing that Petitioner attempted to "shaft" his brother, David Lopez, and that Petitioner attempted to wrongfully influence his vote on the requirements issue; and 3) Fire Captain Timothy Wallace testified during said hearing, testifying that Petitioner telephoned him nine timesduring one shift, seeking to influence his vote on

the requirements issue; also, be testified that Petitioner was doing so to favor his friend, Leroy Harding; and, finally, he had a personal interest in Petitioner not being made permanent in the position, to wit: he was a candidate for the position of Field Training Officer, and he was angered by Petitioner's support for abolition of the two year requirement. With Petitioner out of the way, it would have enhanced his chances of becoming the Field Training Officer. 4) Board members McKey, Lopez and Wallace, due to their personal interests and bias towards Petitioner, should have recused themselves.

d. The hearing was a sham. Due to the bias of several Board members, the adverse outcome was a foregone conclusion. Petitioner had no chance of prevailing.

Petitioner requested that McKey forward to the district court "a certified transcript of the record, or written findings of fact, and all papers on file in the office of the board pertaining to Chief Turner's suspension. . ." On May 22, 1998, Petitioner, after the passage of approximately four months and no response from defendant McKey, or the Board's attorney, filed a Petition for Writ of Mandamus. In a decision dated December 16, 1998, Judge Pettigrew ruled in favor of Petitioner, ordering the Board to "forward a certified transcript of the record, or written findings of fact, and all papers on file in the office of the board pertaining to Chief Turner's suspension to the District Court. The court also awarded Petitioner costs, together with attorney's fees in the amount of $500.00. Respondents disregarded the

court's order. Respondent never forwarded a certified transcript of the record, or written findings of fact, and all papers on file in the office of the board pertaining to Chief Turner's suspension to the district court. Due to Respondent's recalcitrance, Petitioner was never able to appeal the adverse decision to the district court.

While Petitioner was attempting to resolve the Stoufflet matter, the Board met on December 16, 1999, and, pursuant to a motion by Lt. Lopez, which was seconded by Captain Wallace, voted to conduct an investigative hearing of Petitioner regarding matters raised in the hearing on the injunction and the investigative report of parish president Bonvillain. The Board's action was totally out of the ordinary, for it had never initiated an investigation into the conduct of an individual in the classified civil service.

The hearing was scheduled for February 2 and 3, 1998. The undersigned, due to a scheduling conflict, wrote a letter to counsel for the Respondents requesting a continuance of the hearing. Also, he requested a written specification of the charges, copies of the documentary evidence and a listing of the witnesses to be called by the Board. Believing that several Board members were prejudiced against Petitioner, the undersigned requested recusal of Pat McKey, Lieutenant Johnny Lopez, and Captain Timothy Wallace. Although this was the first request for a continuance, the Board, pursuant to the advice of its attorney, refused to continue the hearing, necessitating the filing of a Petition For Injunctive and Declaratory Relief, on June 30, 1998. The court granted Petitioner's request for a temporary restraining order but imposed the unheard of requirement that Petitioner must first post a $10,000 cash, property or

surety bond. This was highly unusual, for Petitioner was **only** seeking the continuance of an administrative hearing, which would not necessitate any financial expenditure to the Board. The hearing on the preliminary injunction was scheduled for hearing on February 6, 1998.

Prior to the February 6th date, counsel for Petitioner was advised that the hearing had been rescheduled for February 10 and 12, 1998. By letter dated February 4, 1998, he advised by counsel for the Board of his unavailability. The Board, without checking with counsel for Petitioner, proceeded to schedule the hearing on Petitioner's motion to recuse and the investigative hearing for February 26 and March 3, 1998. By letter dated February 16, 1998, counsel for Petitioner advised the Board of his unavailability on those dates, due to the fact that he was departing New Orleans on February 26, 1998, returning on March 3, 1998. By February 26, 1998 counsel had not received a response to his letter of February 16, 1998, so he addressed another letter to counsel for the Board. Again, he advised said counsel of his unavailability and, also, the fact that the meeting at which the hearings were scheduled was invalid, since a quorum was lacking. Finally, he was advised that the hearing on the motion to recuse was continued, to be rescheduled at a later date. The rescheduling was necessitated by the fact that due to the resignation of some Board members, there were not enough members to constitute a quorum.

Petitioner was subsequently advised that the hearing on his motion to recuse would be held on July 6, 1998, and the investigative hearing would be held on July 13 and 14, 1998. The investigative hearing was subsequently rescheduled for August 3 and 4, 1998.

Petitioner's hearing was rescheduled for August 3 and 4, 1998. Counsel for Petitioner, in a letter to McKey dated July 23, 1998, moved for the recusal of Respondent, David Falgoust. He alleged the partiality of Mr. Falgoust and his signing of a petition presented to the Board regarding the Fire Training Officer and Fire Inspector positions.

Prior to the hearing on Petitioner's motion for recusal, Respondent Lopez resigned, obviating the need for a hearing respective to him. Petitioner's motion to recuse Pat McKey was denied notwithstanding the fact that she stated that (1) Petitioner was guilty of the offenses charged, and (2) the Respondents were bound by the comments and conclusions articulated by Judge Walker regarding Petitioner notwithstanding the fact that Petitioner was neither a party to the litigation, nor was he represented by counsel. The Board also denied. Petitioner's motion to recuse Respondent Falgoust.

According to a letter to Petitioner from counsel for the Board dated February 13, 1998, "[t]he factual basis for the [investigation] includes, but is not limited to, the testimony and evidence presented at a trial conducted on October 7 and 8, 1997, in the lawsuit entitled "Terrebonne Parish Consolidated Government vs. The Houma Municipal Fire & Police Civil Service Respondents, et al . . ." Further, the letter provided that the issues made the basis of the investigation included, but not by limitation, the following:

"1. Did Daniel Turner violate an agreement with the Civil Service Respondents dated on or about July 30, 1997;"

"2. Did Daniel Turner attempt to have an individual take the test for the position of Fire Training Officer who did not satisfy the qualification requirements for such position;"

"3, Did Daniel Turner threaten Mark Callahan that if he signed a petition being circulated among members of the fire department that Mark Callahan would not be acting Chief again;"

"4. Did Daniel Turner threaten Reed Callahan that if he signed a petition circulated among employees of the fire department that he would be removed as acting District Chief;"

"5. Did Daniel Turner inform Gerald Trahan that Daniel Turner would not have anyone in his administration interfering with what he was trying to do;"

"6. Did Daniel Turner act improperly concerning David Lopez concerning drug testing in September/October 1997;"

"7. Did Daniel Turner act improperly concerning Todd Rhodes;"

"8 Did Daniel Turner exercise favoritism concerning certain employees of fire department including, but not limited to, Leroy Harding;"

"9. Did Daniel Turner threaten Oswald Stoufflet and/or Gerald Trahan;"

"10. Did Daniel Turner threaten the future employment of Oswald Stoufflet and/or Gerald Trahan;"

"11. Other acts of misconduct which may be revealed at the hearing conducted on March 2, 3 and 5, 1999."

The hearing, which the Board was so anxious to commence that it strenuously opposed Petitioner's request for a continuance of the initial hearing date of February 2, 1998, was finally concluded on August 4, 1998, six months later. The Board concluded that Petitioner was guilty of specifications 2, 3, 4, 6 and 8. Petitioner was suspended for a period of seventy (70) working days.

During the hearing on the motion to recuse Respondent McKey, she stated that the Respondents were bound the Reasons and Judgment rendered by Judge Walker in the matter of *Terrebonne Parish Consolidated Government vs. The Houma Municipal Fire and Police Civil Service Respondents and the State of Louisiana through the Office of the State Examiner for Municipal Fire and Police Civil Service,* 32nd Judicial District Court, Parish of Terrebonne, No. 120,260. Reviewing the decision rendered by the Respondents, it did just that - found Petitioner guilty of the exact same charges as Judge Walker. Actually, the hearing was a charade!

On March 9, 1999 Petitioner addressed and mailed two certified letters to Respondent McKey, appealing the Board's decision. Petitioner never received a response from the Board. The Board has totally disregarded Petitioner's appeal.

REASON FOR GRANTING PETITION

The Fifth Circuit Court of Appeals held that since Petitioner failed to exhaust his state procedural remedies, he was precluded from proceeding in federal court to vindicate rights guaranteed pursuant to the due process clause of the 14th Amendment. In so doing, the the Fifth Circuit misinterpreted, and misapplied, this Court's holding in *Parratt v. Taylor,* 101 S.Ct. 1908 (1981).

ARGUMENT

Petitioner was afforded a predeprivation hearing pursuant to state law. However, the hearing was a mockery - a sham. He is not precluded under Parratt from pursuing his due process claim in federal court.

Addressing Petitioner's procedural due process claim, the Court stated that "Turner failed to pursue fully the remedies available to him in the state court system. Accordingly, Turner may not seek relief from the federal courts. *Cathey v. Guenther,* 47 F.3d 162, 164 (5th Cir. 1995) (citing *Hudson v. Palmer,* 468 U.S. 517, 533 (1986); *Parratt v. Taylor,* 451 U.S. 527, 541-42 (1981)." (Pet. App. 2a)

In *Parratt,* an inmate filed suit pursuant to section 1983 when hobby materials that he ordered were lost when normal procedures for receipt of mail packages were not followed. He sued seeking to recover the value of the materials. In holding that plaintiff did not state a claim pursuant to the Due Process Clause of the 14th Amendment, the Court stated that:

> Although he has been deprived of property under color of state law, the deprivation did not occur as a result of some established state procedure. Indeed, the deprivation occurred as a result of the unauthorized failure of agents of the State to follow established state procedure. There is no contention that the procedures themselves are inadequate nor is there any contention that it was practicable for the State to provide a predeprivation hearing. Moreover, the State of Nebraska has provided respondent with the means by which he can receive redress for the deprivation. * * *. This procedure was in existence at the time of the loss here in question but respondent did not use it.

101 S.Ct. at 1915-16.

A reading of *Parratt* reveals that it is not applicable to the case at bar. It applies "to only procedural due process claims involving deprivations that do not result from established state procedures and for which the state cannot practically provide a predeprivation hearing." *Daniels v. Williams,* 720 F.2d 792, 796 n.3 (4th Cir. 1983), *aff'd* 106 S.Ct. 692.

Petitioner admits that, pursuant to state law, a predeprivation hearing was conducted. However, the hearing was nothing more than a sham - the outcome was determined well in advance of the hearing. The most telling evidence of the sham proceedings was the continued presence of Pat McKey and David Falgoust on the Board and their active participation in the proceedings. Because of their comments and actions, they should have recused themselves.

The Due Process Clause of the Fourteenth Amendment "entitles a person to an impartial and disinterested tribunal." *Marshall v. Jerrico, Inc.*, 100 S.Ct. 1610, 1613 (1980). A fair trial in a fair tribunal is a basic requirement of due process. In *re Murchinson,* 75 S.Ct. 623, 625 (1955). This requirement applies not only to courts, but also to administrative bodies. *Withrow v. Larkin,* 95 S.Ct. 1456, 1464 (1975). A tribunal is not impartial if it is biased with respect to the factual issues to be decided at the hearing. *Miller v. City of Mission,* 705 F.2d 368, 372 (10th Cir. 1983).

A person claiming bias has a very high burden. He must defeat " a presumption of honesty and integrity in those serving as adjudicators." *Withrow, id.* He must show the adjudicator "has prejudged, or reasonably appears to have prejudged, an issue." *Keneally v. Lungren,* 967 F.2d 329, 333 (9th Cir. 1992) (Citations omitted).

On the present record bias is clearly present: (1) Pat McKey, the chairperson of the Board, stated prior to the hearing that Petitioner was guilty of the offenses charged, the Board was bound by the findings of fact rendered by a judge presiding over a hearing for injunctive relief in which Petitioner was neither a party nor was he represented by counsel, and that Petitioner's actions caused harm to several firefighters and (2) David Falgoust, board member, was signatory to a petition which formed the basis for six of the charges against Petitioner.

The fact that the chairperson and Falgoust are only 2 of 5 board members is of no moment. As stated by Justice Brennan in his concurring opinion in *Aetna Life Insurance Co. v. Lavoie,* 106 S.Ct. 1580, 1590 (1986):

> [W]hile the influence of a single participant in this process can never be measured with precision, experience teaches us that each member's involvement plays a part in shaping the court's ultimate disposition. The participation of a judge who has substantial interest in the outcome of a case which he knows at the time he participates *necessarily* imports a bias into the deliberative process. This deprives litigants of the impartiality that is the fundamental requirement of due process.

See, also, Stivers v. Pierce, 71 F.3d 732, 747 (9th Cir. 1995) (". . . on a small board like the Board before [the court], a single person's bias is likely to have a profound impact on the decision making process.")

Clearly, Respondent McKey's conclusion that plaintiff was in fact guilty, even without hearing the evidence, violated plaintiff's right to due process. Her statement that the Board was bound by the legally insupportable findings of Judge Walker evidenced the fact that her mind was made well in advance of the hearing. The Board's findings were a mirror image of Judge Walker's. That being the case, there was actually no need for the hearing.

Respondent Falgoust was openly opposed to plaintiff. He was signatory to a petition that pertained to six of the charges brought against Petitioner - the charges pertaining to the Fire Training Officer examination. Further, the Board itself, knowing of opposition to plaintiff, nevertheless denied Petitioner"s motions for recusal.

Adding insult to injury, Petitioner was told to be prepared to defend himself as to "[o]ther acts of misconduct

which may be revealed at the hearing on March 2, 3 and 5, 1999." How can Petitioner prepare a defense to unknown, unspecified charges? At a minimum, Petitioner was entitled to a specification of the charges to be investigated at the hearing. *See Grimes v. Nottaway, County School Board,* 462 F.2d 650 (4th Cir.), *cert. denied,* 409 U.S. 1008, 34 L.Ed.2d 300, 93 S.Ct. 439 (1972). In compelling Petitioner to come prepared to respond to anything that might come up during the hearing did not comport with the most minimal requirements of due process.

Although Petitioner was provided with notice, albeit inadequate, and an opportunity to be heard, they were to no effect. "[D]ue process requires an employee be given the chance to tell [his] side of the story, and that the agency be willing to listen. Otherwise, the 'opportunity' to respond' required by *Loudermill* is no opportunity at all." *Ryan v. Illinois Dept. of Children and Family Services,* 185 F.3d 751 (7th Cir. 1999) In *Ryan,* the court held that a plaintiff who can present evidence that the hearing was a sham is entitled to go forward with a procedural due process claim. 185 F.3d at 762. *See also Adams v. Sewell,* 946 F.2d 757 (11th Cir. 1991), overruled on other grounds by, *McKinney v. Pate,* 20 F.3d 1550 (11th Cir. 1994), (acknowledging the concept that a "sham" hearing can violate due process); *Levenstein v. Salafsky,* 164 F.3d 345, 351 (7th Cir. 1998) ("[W]hen the procedures used to investigate charges are a sham through and through, there has not been an opportunity to respond.")

Clearly, the investigative hearing conducted by the Board was a sham *ab initio.* The Fifth Circuit's ruling that Petitioner was precluded from litigating this claim in federal court was patently erroneous. The decision was contrary

to decisions reached in other circuits, particularly the Seventh and Eleventh Circuits. Petitioner presented substantial evidence establishing numerous biases harbored by board members, conclusions reached by the chairperson of the board respective to Petitioner's guilt prior to any testimony being taken, re-investigation by the Board on matters on which Petitioner had previously been acquitted or deemed guilty, and charges that were legally insufficient, and charges lacking specificity. This evidence and reasonable inferences which can be drawn from the evidence create a genuine issue of material fact as to whether the Board's hearing was a "sham" and, therefore, defeat summary judgment on the procedural due process claim.

CONCLUSION

Parratt's applicability depends on there being a deprivation that (1) was not a result of established state law, **and** (2) occurred before there was an opportunity for a hearing to take place. Neither situation is present in the case at bar. First, there was a hearing pursuant to state law. Second, the hearing occurred prior to the deprivation.

Although there was a hearing, in the strictest sense of the word, it failed to comport with the requirements of due process. It was a "sham" proceeding, with Petitioner having no chance of winning. As several circuits have recognized, a "sham" hearing violates due process and an individual can pursue that claim in federal court.

This writ must and should be granted. Otherwise, the viability of *Parratt* will be called into question. Further,

this Court must determine an issue of extreme significance, to wit: whether a party may challenge a "sham" hearing on due process grounds without first having to exhaust state remedies.

Respectfully submitted:

RONALD L. WILSON (#13575)
210 Baronne Street, Suite 1800
New Orleans, Louisiana 70112
PH: (504) 525-4361
FAX: (504) 525-4380
E-mail: cabral2@aol.com
COUNSEL FOR PETITIONER
BY:_____

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-30984

FILED
June 6, 2003

DANIEL TURNER,

Plaintiff-Appellant,

versus

HOUMA MUNICIPAL FIRE AND
POLICE CIVIL SERVICE BOARD,
PAT MCKEY, TIMOTHY WALLACE,
JOHNNY LOPEZ, JOE ROY,
DAVID FALGOUST, CRAIG LANDRY,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 99-CV-152-A

Before DAVIS and BENAVIDES, Circuit Judges, and RESTANI,* District Judge.

PER CURIAM:**

* Judge, U.S. Court of International Trade, sitting, by designation.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Appellant Daniel Turner appeals from an adverse summary judgment rendered in favor of appellees, the Houma Municipal Fire and Police Civil Service Board and its members in their official capacities ("the Board") . We affirm[1] the judgment of the district court for the following reasons:

1. We find no merit to Turner's argument that the district court erred in permitting the Board to file a motion for summary judgment after the deadline for filing such motions had expired. This Court has previously held that a district court may consider a motion for summary judgment filed after the date set by a scheduling order. *Matter of Caravan Refrigerated Cargo, Inc.,* 864 F.2d 388, 393 (5th Cir. 1989).

2. With regard to the procedural due process claim in issue, Turner failed to pursue fully the remedies available to him in the state court system. Accordingly, Turner may not now seek relief from the federal courts. *Cathey v. Guenther,* 47 F.3d 162, 164 (5th Cir. 1995) (citing *Hudson v. Palmer,* 468 U.S. 517, 533 (1986); *Parratt v. Taylor,* 451 U.S. 527, 541-42 (1981)).

3. Turning finally to Turner's equal protection claim, we find no error in the district court's conclusion that the record cannot support a finding of the Board's liability. As an initial matter, Turner cannot prove his prima facie case. In this regard, there is no summary judgment evidence of any similarly-situated individual who committed acts similar to those of Turner but was not punished in a similar manner, as

---

[1] We find no merit to the Board's claims that the doctrines of res judicata, collateral estoppel, or prescription bar Turner's claims.

required by *Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1090 (5th Cir. 1995) and *Nieto v. L. & H. Packing Co.*, 108 F.3d 621, 623 (5th Cir. 1997). We note that none of the evidence proffered by Turner concerned an individual situated in a position as high-ranking as that which Turner held. Indeed, to the contrary, the Board's summary judgment motion suggests that a white police chief was fired, rather than suspended, as Turner was, for behavior similar to that of Turner. Moreover, the investigation and suspension of Turner was unique in that it followed a determination by a state district court that Turner engaged in illegal behavior. Furthermore, Turner's summary judgment evidence falls woefully short of showing pretext for the Board's suspension. *See Mayberry*, 55 F.3d at 1091.

AFFIRMED.

APPENDIX B

MINUTE ENTRY
ZAINEY, J.
JULY 3, 2002

FILED
2002, JUL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DANIEL TURNER	CIVIL ACTION
VERSUS	NO. 99-152
HOUMA MUNICIPAL FIRE, ET AL.	SECTION "A" (3)

Before the Court is a **Motion for Summary Judgment (Rec. Doc.73)** filed by defendants Houma Municipal Fire and Police Civil Service Board, Pat McKey, Timothy Wallace, Johnny Lopez, Joe Roy, David Falgoust, and Craig Landry. Plaintiff, Daniel Turner, opposes the motion. The motion, set for hearing on May 22, 2002, is before the Court on the briefs without oral argument. For the reasons that follow, the motion is DENIED.

Factual Background[1]

The City of Houma Municipal Fire and Police Civil Service
Date of Entry: July 08, 2002

[1] This background is taken primarily from the Fifth Circuit Court of Appeals' decision, reported at 229 F.3d 478, in which the court found no immunity for claims brought against Defendants in their official capacities.

Board ("the Board") sits in the Parish of Terrebonne, Louisiana. Created pursuant to Louisiana statute, La. R.S. 33:2471-2506, the Board serves as the organization responsible for representing "the public interest in matters of personnel administration in the fire and police services of the [local] municipal entity." La. R.S. 33:2477 (l) (West 2000). The Board advises the mayor, the commissioner of public safety, and the chiefs of fire and police in the municipality on the personnel administration of the fire and police departments. See id. § 33:2477 (2). Relevant to the instant case, the Board also is charged with conducting investigations and adjudicating complaints regarding fire and police employees. See id. § 33:2477 (5)- (6).

Plaintiff, Daniel Turner ("Turner"), became a fireman with the City of Houma Fire Department in 1968 and eventually rose through the ranks to the position of provisional fire chief in 1997. The conflict underlying this suit arises as a result of investigations and hearings initiated by the Board into Turner's fitness as provisional fire chief. Turner, an African-American, claims he would have been the first African-American permanent fire chief in Houma, but for the Board's actions. Believing the hearings to be racially motivated and discriminatory, Turner sued the Board and its members in their individual and official capacities pursuant to 42 U.S.C. § 1983.

The central conflict between Turner and the Board members had its advent in a disagreement over the qualifications necessary to be employed as a Fire Training Officer for the City of Houma.[2] In July 1997, Turner, in his role of

[2] The Fire Training officer is responsible for training all firemen in the City of Houma.

provisional fire chief, requested that the Board modify the qualification requirements for the position of Fire. Training Officer and delay the test for the position scheduled to be given on September 16, 1997. Turner's proposal would have eliminated the requirement that an individual serve two years as captain prior to applying for the position of Fire Training Officer. The Board tabled Turner's request until after the September 16th exam and asked him to submit the request again in writing.

On September 11, 1997, the Terrebonne Parish Consolidated Government filed a petition for a temporary restraining order (TRO) and injunction requesting that the administration of the September 16th exam be enjoined. The Parish argued to the court that the two-year requirement gave the Fire Training Officer position the appearance of a "promotional class" position rather than a "competitive class" position and thereby presented an arbitrary barrier to applicants. Turner was not a party to the petition.

The state court granted the TRO. At the trial regarding the petition, however, allegations surfaced that Turner had misused his authority as provisional Fire Chief in his efforts to change the Fire Training Officer qualifications. The state court concluded that Turner had acted illegally and in violation of the Civil Service Rules in his actions with employees concerning the dispute over the Fire Training Officer qualification requirements.[3] The state court then dissolved the TRO.

[3] The state court found that Turner had intimidated other firemen and had misused his position of authority in an attempt to change the requirements for the Fire Training Officer position. The court found that these actions had a "chilling effect" on the rights of civil service employees.

As a result of the allegations at trial, the Board began investigating Turner. The Board asked the Terrebonne Parish Consolidated Government to investigate and submit a report on his conduct. On November 12, 1997, Turner was placed briefly on administrative leave, but no further disciplinary action was taken.

Also in November, Oswald Stoufflet, a Captain in the Houma Fire Department filed a complaint against Turner with the Board. The complaint alleged that Turner acted unprofessionally toward Stoufflet.[4] The Board held a public hearing on Turner's conduct with Stoufflet on January 6, 1998. After the hearing, the Board suspended Turner for 30 days. Turner appealed the decision to state court.[5] Turner also requested a certified transcript of the hearing, a request that the Board never honored.[6] Turner alleges that the Board's reluctance to provide him with a transcript has prevented him from appealing the adverse ruling of the hearing.

---

[4] In Stouffiet's complaint to the Board, he stated that Turner acted "in a manner unbecoming to his position and to me personally."

[5] The appeal to the state court alleged that (1) the hearing was held in violation of Louisiana statutory law governing notice of hearings in that the Board had failed to inform Turner of the date, time, and place of the hearing, La. R.S. 33:2501 (B) (1); (2) the decision was contrary to law and evidence as to the misconduct charge; (3) the board members were biased against him; and (4) the Board did not fairly evaluate the arguments.

[6] Turner filed a mandamus action to compel the Board to supply him a transcript and other documentation in order to perfect his appeal. Turner prevailed in the mandamus action but claims that Defendants never complied with the mandamus order. Defendants assert that they did comply but their documentation was inadvertently filed in the wrong state court action.

On February 6, 1998, the Board initiated another investigation into the allegations detailed in the state court trial. A hearing was convened in July and August 1998, which resulted in Turner's suspension for 70 days. Turner alleges numerous procedural errors in this hearing as a result of the Board's alleged racial and personal bias against him. Turner also argues that the hearings and investigations were an attempt to derail his appointment as the first African-American permanent fire chief.

The Complaint and Prior Proceedings

In January 1999, Turner brought a 42 U.S.C. § 1983 suit against the Board and board members Pat McKey, Timothy Wallace, Johnny Lopez, Joe Roy, David Falgoust, and Craig Landry in their official and individual capacities. He alleged that the disciplinary hearings were racially discriminatory and violated his Fourteenth Amendment due process and equal protection rights. He also alleged that as a result of the Board's actions he was deprived of the rights, opportunities, and privileges of employment and that he suffered intentionally inflicted emotional distress. Turner sought compensatory and punitive damages from the Board and its members. In addition, he sought a declaration that the manner in which the defendants conducted the hearing violated his equal protection and due process rights existing under the Fourteenth Amendment and sought injunctive relief asking that the defendants discontinue those practices.

Defendants moved for summary judgment asserting absolute quasi-judicial immunity for their adjudicative actions of investigating and disciplining Turner. The Court denied Defendants' immunity as it related to the

official-capacity claims and granted the motion as to the individual-capacity claims. Defendants took an interlocutory appeal and the Fifth Circuit affirmed finding that the Board and its members had no absolute quasi-judicial immunity defense under section 1983 as to the official capacity claims.

Defendants' Motion for Summary Judgment

Defendants now move for summary judgment arguing (1) that Turner has failed to exhaust the remedies available pursuant to state law, (2) that Turner's state law claims are barred by La. R.S. 9:2798.1, and (3) this matter should be stayed pending resolution of any pending state court claims.

Discussion

(1) Turner's Failure to Exhaust State Law Remedies

Defendants argue that Turner's constitutional claims are in fact procedural due process claims arising out of his administrative hearings and are therefore not actionable under section 1983. Defendants argue that state law offers adequate procedures to satisfy procedural due process but Turner chose not to pursue his administrative appeals or seek judicial review in state court as provided by state law. Accordingly, pursuant to the Parratt/Hudson doctrine, which bars a section 1983 suit for certain procedural due process claims, Turner can state no claim under section 1983.

In opposition, Turner argues that he has alleged violations of a substantive right protected by the Constitution as opposed to a violation of his procedural due process rights. Namely, he asserts that by singling him out for disciplinary

action where Caucasian officers were not disciplined under similar circumstances, his equal protection rights were violated. Further, he asserts that any unfairness at his administrative hearings was based upon racial animus by the Board thereby making his claims substantive in nature rather than procedural. Accordingly, he argues, the Parratt/Hudson doctrine does not operate to bar his section 1983 claims.

Law

At the outset it must be noted that redress for civil rights violations pursuant to 42 U.S.C. § 1983 does not require exhaustion of state law remedies or procedures. See Myrick v. City of Dallas, 810 F.2d 1382, 1388 (5th Cir. 1987). In Patsy v. Board of Regent., 457 U.S. 496, 102 S. Ct. 2557, 73, L. Ed. 2d 172 (1982), the Supreme Court categorically rejected any such impediment to bringing a section 1983 suit. The Court found that imposing an exhaustion requirement would be inconsistent with Congress' intent in enacting section 1983, *i.e.*, protecting individuals' basic federal rights against incursions by state power. Id at 503, 102 S. Ct. at 2561.

Thus, if plaintiff alleges facts establishing that (1) conduct by a person acting under color of state law, has (2) deprived him of a right, immunity, or privilege secured by the Constitution or laws of the United States, then he has stated a claim for relief under section 1983. Plaintiff need not demonstrate exhaustion of administrative remedies as federal law imposes no such requirement, and overlapping state remedies are generally irrelevant to the question of whether a cause of action exists under section 1983. Zinermon v. Burch, 494 U.S. 113, 124, 110 S. Ct. 975, 982,

108 L. Ed. 22 100 (1990).[7]

However, the Parratt/Hudson doctrine, derived from two landmark Supreme Court decisions, Parratt v. Taylor, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981), overruled in part on other grounds by Daniels v. Williams, 474 U.S. 327, 106 S. Ct. 6621 88 L. Ed. 2d 662 (1986), and Hudson v. Palmer, 468 U.S. 517, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984), in one ***limited*** circumstance, does make state law remedies relevant to the question of whether plaintiff can state a claim under section 1983. Pursuant to the Parratt/Hudson doctrine, plaintiff cannot bring a ***procedural*** due process claim under section 1983 when plaintiff is deprived of a property right by random and unauthorized conduct of state actors ***if*** the state provides an adequate post deprivation remedy.[8] Cathey v. Guenther, 47 F-3d 162, 164

---

7 Thus, Defendants' argument that Turner's suit is *premature* is without merit. The existence *vel non* of a 1983 cause of action and not its prematurity is at issue here.

8 Once the state (via its laws) confers a property right it cannot constitutionally deprive an individual of such an interest without appropriate procedural safeguards. See Schaper v. City of Huntsville, 813 F.2d 709, 714 (5th Cir. 1987) (citing Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985)). The constitutional protection of procedural due process prohibits the state from depriving an individual of life, liberty, or property" without due process of law. Zinermon, 494 U.S. at 126, 110 S. Ct. at 983. The issue in a ***procedural*** due process claim is whether the state provides ***procedures*** that adequately protect an individual from arbitrary or erroneous deprivations. Augustine v. Doe, 740 F.2d 322, 326 (5th Cir. 1984). Thus, a procedural due process claim is not directed at the validity *vel non* of the underlying deprivation but rather at the procedural protections attendant to that deprivation. See id.

(5th Cir. 1995) (citing Hudson, 468 U.S. at 533, 104 S. Ct. at 3203-04). The crux of Parratt./Hudson is that procedural due process violations do not arise, i.e., the constitutional violation is not complete, simply from a deprivation of property but rather until the state system fails to provide some procedure for redress. See Dismukes v. Hackathorn, 802 F. Supp. 1442, 1446 (N.D. Miss 1992) (citing Gilmere v. Atlanta, 774 F.2d 1495 (11th Cir. 1985) (en banc)).[9]

In keeping with the limited application of the Parratt/Hudson doctrine, various courts, including the United States Supreme Court and the Fifth Circuit, have recognized that Parratt/Hudson does not bar a claim under section 1983 when plaintiff alleges a violation of a specific substantive right guaranteed by the United States Constitution. See Zimeron, 494 U.S. at 125, 110 S. Ct. at 983; **Augustine,** 740 F.2d at 326 (Fifth Circuit); Watts v. Burkhart, 854 F.2d. 839, 842 (6th Cir. 1988). Thus, 1983 suits premised upon fourth amendment violations or equal protection violations are unaffected by Parratt/Hudson. As the Fifth Circuit clarified in Augustine, the Parratt/Hudson doctrine "is not a magic wand that can make any section 1983 action resembling a tort suit disappear into thin air. Parratt/Hudson has potential applicability **only** when the plaintiff alleges a deprivation of ***procedural*** due process; it is ***irrelevant*** when the plaintiff has alleged a violation of some substantive constitutional

---

[9] The only possible deprivation of a property right in Turner's case would be the 30 and 70 day suspensions from his existing employment. Because Turner never received the permanent fire chief position, he had no property right in that employment. Thus, he was owed no procedural due process with respect to the permanent position.

proscription." 740 F.2d at 329 (emphasis added).[10]

Analysis

Returning to the case at hand, the Court turns its attention to the allegations contained in Turner's complaint. If Defendants are correct in their assertion that Turner's complaint alleges only allegations of procedural due process surrounding his two suspensions, then Parratt/Hudson would unarguably preclude the 1983 claims unless he had also alleged that the state court procedures, even if followed by Defendants, were in and of themselves deficient for due process purposes.

Turner's original and amending and supplemental complaints (Rec. Docs. 1 & 19) provide so much detail as to the events surrounding the administrative hearings before the Board, the Defendants' reliance on Parratt/Hudson is understandable. While this case presents a close call as to whether Parratt/Hudson precludes Turner's 1983 claims in their entirety, the Court concludes that the complaint does

---

[10] In their reply memorandum Defendants attempt to discredit Augustine by pointing out that the Fifth Circuit declined to follow Augustine in Schaper v. City of Hunstville, 813 F.2d 709 (5th Cir. 1987). In Schaper, the Fifth Circuit merely held that Parratt applied to plaintiff's substantive ***due process*** claims as well as his procedural due process claims. Id. at 718. In so holding, the Fifth Circuit found the facts involved in Schaper to be distinguishable from Augustine. Thus, Schaper does not impact Augustine for the proposition for which Turner cites it in this case, i.e., that, allegations of violations of ***other*** substantive constitutional rights are not affected by Parratt/Hudson.

contain some allegations that escape Parratt/Hudson when given a liberal construction as the Court is required to do.[11]

For instance, Turner alleges that he ultimately lost out on the permanent fire chief position due to the various complaints that were brought against him and the conduct of the Board during the hearings based on those complaints. Rec. Doc. 19, at ¶ 24. He alleges that the disciplinary complaints, investigations, and hearings were motivated and tainted by racial animus and that he was therefore denied equal protection of the law because he was singled out for disciplinary action and denied fair hearings due to his race. Id. at ¶¶ 29 & 30; Defendants' Memorandum at 6. Thus, viewing the allegations of Turner's complaint in the light most favorable to him, the complaint does allege violations of equal protection-an independent substantive right guaranteed by the Constitution and therefore actionable under section 1983 notwithstanding Parratt/Hudson or any other available state court remedies. The complaint is not limited, as Defendants assert, solely to procedural due process claims.[12]

Defendants argue that Turner cannot avoid Parratt/Hudson by merely couching his procedural due

---

[11] The Court emphasizes that only the viability of Plaintiff's allegations is at issue at this time-a question strictly of law. Defendants have not premised their motion for summary judgment on Plaintiff's inability to create an issue of fact as to those allegations.

[12] It also must be noted, that Turner's claims regarding his loss of the permanent fire chief position cannot possibly be procedural due process claims because he had no property interest in that employment given that he had never been selected for the position. The threshold requirement for a procedural due process claim is that plaintiff must have some property right conferred pursuant to state law. See supra note XX.

process claims in terms of equal protection violations. In so arguing, Defendants rely upon Schaper v. City of Huntsville, arguing that Turner's case presents the exact type of claims present in Schaper. Defendants' Reply Memorandum at 5. Defendants ignore however, a crucial distinction between Turner's case and Schaper: In Schaper, plaintiff claimed that the state administrative hearings following his termination as police captain were meaningless due to bias. Thus, Schaper's claim was a direct attack on the process afforded him in terms of the hearing intended to redress his suspension-a claim clearly within the ambit of Parratt/Hudson.

As the Court reads Turner's complaint, however, he is not asserting that racial bias during the Board hearings rendered his 30 and 70 day suspensions as deprivations without due process of law-claims clearly barred by Parratt/Hudson. Rather, Turner asserts that he was subjected to racial bias during the administrative hearings which constituted a violation of his equal protection rights independently and regardless of the adequacy of the hearings as redress for the 30 and 70 day suspensions. He contends that this racial bias was part of the pattern of discrimination that ultimately kept him out of the permanent fire chief position. Accordingly, to the extent he alleges equal protection violations, even though some of those violations might have taken place in the administrative hearings, his claims are not barred by Parratt/Hudson.

In sum, Turner's complaint states a claim for relief under section 1983 because he has alleged deprivations of a constitutional right at the hands of state actors. However, given that only official capacity claims remain, Turner can only prevail on his 1983 claims if he can ultimately show that any alleged acts of discrimination were done pursuant

to official policy or custom of the Board. See Monell v. New York City Dep't of Soc. Servs., 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). The question of whether Turner can avoid summary judgment by creating a genuine issue of fact as to the official capacity racial discrimination claims.has not been briefed and therefore is not currently before the Court in this motion for summary judgment. The Court merely concludes that the bare allegations of Turner's complaint are sufficient to avoid dismissal of his 1983 claims under Parratt/Hudson-the Court makes no determination as to the merits of Turner's claims.

(2) ***Applicability of La. R.S. 9:2798.1 to Turner's State Law Claims***

Turner's state law allegations are based on violations of unspecified guarantees under the Louisiana Constitution as well as intentional infliction of emotional distress. Defendants argue that Turner's state law claims are barred by La. R.S. 2798.1, the discretionary function immunity statute. Turner did n' t brief the viability of his state law claims in his opposition memorandum.

La. R.S. 2798.1 provides in pertinent part:

> Liability shall not be imposed on public entities or their officers or employees based upon the exercise or performance or the failure to exercise or perform their policymaking or discretionary acts when such acts are within the course and scope of their lawful powers and duties.

La. R.S. 9:2798.1(B) (West 1997).

In Commerce & Industry Insurance Co. v. Grinnell Corp., 280 F.3d 566 (5th Cir. 2002), the Fifth Circuit recently explained how Louisiana's discretionary immunity statute applies to prohibit certain state law claims.[13] In determining whether immunity applies, Louisiana courts employ the two-step test set out by the United State Supreme Court in Berkovitz v. United States, 486 U.S. 531, 108 S. Ct. 1954, 100 L. Ed. 2d 531 (1988), when determining immunity under the Federal Tort Claims Act. Commerce & Industry, 280 F.3d at 571. The first step of the Berkovitz test requires that, the action at issue be discretionary, i.e., the product of judgment or choice. Id. (quoting Berkovitz, 486 U.S. at 536, 108 S. Ct. at 1954). Thus, immunity does not apply when. a statute, regulation, or ordinance specifically prescribes a course of action for the employee to follow. Id.

Assuming the challenged conduct involves an element of discretion or judgment, step two of Berkovitz requires the court to then determine whether that judgment is of the kind that the discretionary function exception was designed to shield. Id. at 572. The discretionary immunity statute only protects governmental action based upon considerations of public policy. Id. In short, if the discretionary act was grounded in social, economic, or political policy, then the discretionary function exception immunizes the public entity (or employee) from suit. id.

Assuming *arguendo* that the Board's decision to investigate and discipline Turner, as well as the.allegedly

---

[13] Clearly, the state statute cannot operate to bar claims brought pursuant to a federal statute like section 1983 which enjoys supremacy clause protection.

discriminatory conduct occurring during the hearings, satisfy step one of Berkovitz,[14] Defendants have failed to meet their initial burden on summary judgment of demonstrating that their discretionary acts were grounded in social or public policy. Defendants offered no affidavits or depositions regarding their conduct which leaves before the Court only Plaintiff's allegations of racially disparate treatment. The Court must accept those allegations as true given Defendants' failure to offer any evidence to force Plaintiff to come forward with his own evidence in order to avoid summary judgment. Moreover, to the extent that Plaintiff could establish that any of the conduct at issue was in fact motivated by racial bias, the discretionary immunity statute would likely afford no protection to such illegitimate conduct. Accordingly, Defendants' motion is DENIED insofar as it seeks dismissal of Turner's state law claims at this time.

(3) ***Applicability of Federal Abstention Doctrines***

Defendants argue that the present proceeding should be dismissed or, alternatively, stayed pending the resolution of an identical suit filed by Turner in the 32nd Judicial Court for the Parish of Louisiana. Defendants argue that federal jurisprudence provides for abstention when there are pending state matters. Railroad Commission of Texas v. Pullman Co., 312 U.S. 496, 61 S. Ct. 643, 85 L. Ed. 971 (1941); Burford v. Sun Oil Co., 319 U.S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943); Colorado River Water Conservation District v. United States, 424 U.S. 800, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976).

[14] Defendants concede that state law mandates the Board to investigate complaints made by firefighters, Defendants' Memorandum at 10, so immunity would not apply to the Board's ***decision*** to investigate the Stoufflet complaint in light of the first Berkovitz step.

Because Turner has filed a state court action involving the exact same controversy utilizing the same allegations, Defendants argue the present suit should be dismissed to prevent duplicative efforts and the potential for double recovery. Even if the Court should decide not to dismiss the present suit, Defendants argue that Burford and Pullman abstention allow a district court to stay a proceeding pending the outcome of the state action. Moreover, Defendants argue that a Colorado River stay is also available if the state action should not provide a complete and prompt resolution of the issues. Accordingly, pursuant to the Burford, Pullman, and Colorado River abstention doctrines, Turner's suit should be dismissed or stayed pending the conclusion of the state court matter.

In opposition, Turner contends that none of the abstention doctrines are applicable in this particular matter. First, Turner argues that Burford abstention is proper only when difficult questions of state law concerning issues of substantial public policy exist. Turner points out that his claim does not turn on questions of state law, but rather federal law, namely, the Fourteenth Amendment and 42 U.S.C. § 1983. Second, Turner argues that Pullman abstention is appropriate only when (1) there is an unsettled issue of state law; and (2) when there is a possibility that the state law determination will render the federal question moot. Turner subjects the present action to this 2-part test and argues that because the legal issues raised are federal, and the resolution of this matter will wholly depend on issues of constitutional law, Pullman abstention does not apply.

Finally, Turner argues that Colorado River abstention does not apply because the state action he filed cannot provide for a "complete and prompt resolution of the issue,"

because the claim raised in state court, although concerning the same incident, is completely distinct from his federal court claim.

Law and Analysis

While federal courts have a strict duty to exercise jurisdiction that is conferred upon them by Congress, the duty is not absolute. Quackenbush v. Allstate Insurance Co., 517 U.S. 706, 716 (1996). Keeping in mind that abstention is the exception and not the rule, federal courts may decline to exercise their jurisdiction in circumstances where denying federal forum would clearly serve important countervailing interest such as considerations of proper constitutional adjudication, regard for federal-state relations, or wise judicial administration. Id. In exercising their discretion, federal courts must "fit within the narrow and specific limits prescribed by the particular abstention doctrine involved." Webb v. B.C. Rogers Poultry Inc., 174 F.3d. 697, 701 (5th Cir. 1999) (quoting Clark v. Fitzgibbons, 105 F.3d 1049, 1051 (5th Cir.1997)). The Court considers each of the abstention doctrines in turn.

The Burford abstention doctrine allows federal courts to dismiss a case only if it presents

> [D]ifficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar or if its adjudication in a federal forum would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.

Quackenbush, 517 U.S. at 707, 116 S. Ct. at 1716 (quoting Colorado River, 424 U.S. at 814, 96 S. Ct. at 1244-45).

The Supreme Court has emphasized that the Burford abstention doctrine is limited only to equitable actions, and if the case presents any claim for damages at law, abstention based on Burford is inappropriate. New Orleans Public Service, Inc. v. Council of City of New Orleans, 491 U.S. 350, 109 S. Ct. 2506, 105 L. Ed. 2d 298 (1989).

In Turner's complaint, he prays, among other things, for an award of general, actual, compensatory, and punitive damages. Such forms of relief are legal in nature and thus Burford abstention is inappropriate. While Defendants assert that Burford can sometimes provide a stay in a damages action, such an application is an extremely narrow exception to the Court's virtually unflagging obligation to exercise jurisdiction. Quackenbush, 517 U.S. at 730, 116 S. Ct. at 1728. Thus, abstention under Burford does not apply.

The Pullman abstention doctrine allows a federal court to refrain from exercising its jurisdiction only when (1) there is an unsettled issue of state law, and when (2) there is a possibility that the state law determinations would moot or present in a different posture the federal constitutional question raised. Ibarrra v. Bexar County Hospital District, 624 F.2d 44 (5th Cir. 1980); Stephens v. Bowie Count , Texas, 724 F.2d 434 (5th Cir. 1984). Thus, in order for a court to apply the Pullman doctrine to deny or postpone federal jurisdiction, an "ambiguous state law claim" must exist. Brooks v. Walker County Hospital District, 688 F.2d 334, 336 (5th Cir. 1982).

Turner's complaint alleges violations of both federal and state law. However, no ambiguous or unsettled issue of state law exists in the instant case. Thus, Pullman abstention is clearly inappropriate.

Finally, the Court likewise concludes that Colorado River abstention does not apply. The Supreme Court has not provided a "hard and fast rule" for the application of Colorado River abstention, however it has set forth 6 factors to aid the Court's decision in whether to exercise its jurisdiction:(1) assumption by either court of jurisdiction over a res; (2) the relative inconvenience of the forums; (3) the avoidance of piecemeal litigation; (4) the order in which jurisdiction was obtained by the concurrent forums; (5) whether and to what extent federal law provides the rules of decision on the merits; and (6) the adequacy of the state proceedings in protecting the rights of the party invoking federal jurisdiction. Black Sea Investment, Ltd. v. United Heritage Corporation, 204 F.3d 647, 650 (5th Cir. 2000). In applying these factors to any given situation, a federal court must keep in mind that "the balance [should be] heavily weighted in favor of the exercise of jurisdiction." Id.

Turning to the various factors, none of them support abstention under Colorado River. First, Turner's case does not involve any res or property over which any court, state or federal, has taken control. Second, there is no inconvenience of the forums as both the federal and state courts are in approximately the same geographic area. Third, because no court has assumed jurisdiction over a disputed res, there is no danger of piecemeal litigation. Finally, this case largely turns on issues to be decided under federal law. In conclusion, all of the Colorado River factors relevant to this case

are either neutral to or counsel against abstention. In light of the weighted balance in favor of exercising jurisdiction, abstention is clearly inappropriate under Colorado River.

Lastly, the defendants proclaim that Turner's claim must be abstained in order to avoid "duplicative efforts" in litigation. Such an end, however, is of no moment as the Court in Black Sea explicitly stated, "the prevention of duplicative litigation is not a factor to be considered in an abstention determination." Id. at 650.

In sum, the judicially promulgated abstention doctrines of Burford, Pullman, and Colorado River are either inapplicable or counsel against abstention in the present circumstances. Accordingly, Defendants, motion is DENIED insofar as they seek a dismissal and/or stay under the federal abstention doctrines.[15]

Accordingly;

IT IS ORDERED that the **Motion for Summary Judgment (Rec. Doc.73)** filed by defendants Houma Municipal Fire and Police Civil Service Board, Pat McKey, Timothy Wallace, Johnny Lopez, Joe Roy, David Falgoust, and Craig Landry should be and is hereby **DENIED**.

* * * * * * * *

---

[15] In their reply memorandum, Defendants briefed for the first time the defenses of prescription and res judicata. Out of fairness to Turner, the Court declines to consider those issues given that he has had no opportunity to respond.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DANIEL TURNER CIVIL
ACTION

VERSUS NO: 99-152

HOUMA MUNICIPAL FIRE AND SECTION: "A"
POLICE CIVIL SERVICE BOARD, ET AL

FILED
2002 AUG 30

JUDGMENT

For the written reasons of the Court on file herein, accordingly;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants, Houma Municipal Fire and Police Civil Service Board, Pat McKey, Timothy Wallace, Johnny Lopez, Joe Roy, David Falgoust and Craig Landry, and against plaintiff, Daniel Turner, dismissing plaintiffs complaint with prejudice.

New Orleans, Louisiana, this **30th** day of August 2002.

/s/ Jay C. Zainey
JAY C. ZAINEY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DANIEL TURNER	CIVIL ACTION
VERSUS	NO: 99-152
HOUMA MUNICIPAL FIRE, ET AL.,	SECTION "A"(3) HOUMA DOCKET

FILED
2002 AUG 30

ORDER AND REASONS

Before the Court is a **Motion for Summary Judgment (Rec. Doc. 111)** filed by the Houma Municipal Fire & Police Civil Service Board, Pat McKey, Timothy Wallace, Johnny Lopez, Joe Roy, David Falgoust, and Craig Landry (collectively "the Board"). Plaintiff, Daniel Turner ("Turner") opposes the motion. The motion was set for hearing on August 28, 2002, at which time the Court heard oral argument and took the matter under advisement. The Court having now considered the applicable law, evidence of record, and arguments presented by able counsel is ready to rule.

The Board moves for summary judgment arguing that Turner can point to no evidence tending to show that he was singled out for investigation by the Board on the basis of race, i.e., that his equal protection rights were violated with deliberate indifference.

In opposition, Turner argues that the Board has never undertaken similar investigations of Caucasian fire fighter, and that the reasons issued by Judge Walker in suit no. 120,260, Def. Exh. C, were so flawed that an investigation could not be justified based on their content.

In determining whether a party is entitled to summary judgment, the court views the evidence in the light most favorable to the non-moving party. Littlefield v. Forney Indep. School Dist., 268 F.3d 275, 282 (5th Cir.2001) (citing Smith v. Brenoettsy, 158 F.3d 908, 911 (5th Cir.1998); Tolson v. Avondale Indus., Inc., 141 F.3d 604, 608 (5th Cir.1998)). Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Id. (citing Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). The moving party bears the burden, as an initial matter, of showing the district court that there is an absence of evidence to support the nonmoving party's case. Id. (citing Celote , 477 U.S. at 325, 106 S. Ct. at 2548). If the moving party fails to meet this initial burden, the motion must be denied regardless of the nonmoving party's response. Id.

As an initial matter, the Court notes that the only claim remaining at this juncture is Turner's equal protection claim with respect to the February 1999, 70 day suspension.[1]

---

[1] At oral argument the Court laid to rest any suggestion that Turner has any due process claims that survived the Court's ruling on the Board's prior motion for summary judgment. Furthermore, Turner conceded that any claims with respect to the 30 day suspension in 1998 are prescribed.

Moreover, due to prior rulings of this Court, no personal capacity claims remain leaving only claims asserted against the Board members in their official capacities. Thus, the sole issue for the Court's consideration is whether Turner has pointed to any evidence to create an issue of fact for the jury on this claim, i.e., whether Turner's equal protection rights were violated when the Board chose to investigate, and ultimately discipline Turner, following Judge Walker's November 17, 1997, Reasons for Judgment in suit no. 120,260. Def. Exh. C. More specifically, however, the Court's inquiry is whether Turner can point to any evidence to create an issue of fact that the investigation and disciplinary action were *racially* motivated.[2]

La. R.S. § 33:2477, which governs investigations by civil service boards, contains mandatory language regarding investigations by the Board. Pursuant to the authority granted the Board under this provision of state law and its mandate, the Board instituted an investigation of Turner based upon Judge Walker's conclusion that Turner's actions in conjunction with the fire training officer position "were clearly illegal and in violation of civil service rules governing superiors and their employees." The Board points out that it would have been an act of malfeasance for it to ignore such statements and decline to investigate.

At oral argument Turner conceded that the investigation was within the legal authority of the Board, however, he argues that the investigation, while authorized, was nevertheless unconstitutional because it was racially motivated.

---

[2] The Court will assume for purposes of the instant motion that Turner could establish that the Board's actions constituted a policy pursuant to Monell and its progeny.

The Court concurs with Turner's characterization of the law. Surely if the Board were conducting racially-motivated investigations then the authority pursuant to which these investigations occur would offer no shield from liability. The problem with Turner's argument vis A vis this case, however, is that he has pointed to no evidence whatsoever upon which a jury could validly conclude that the Board's actions were prompted by Turner's race.

Although Turner cites a litany of actions and conduct that would lead anyone to conclude that no love was lost between Turner and the Board, any conclusion that the Board's actions were based upon race would be sheer speculation. Turner has simply pointed to no evidence of any sort that suggests a racial motive for the Board's actions. Assuming arguendo that the Board "had it in" for Turner, the fact that he happens to be an African-American is insufficient in and of itself to prove his case. Furthermore, given that the only African-American member of the Board ultimately voted in favor of the 70 day suspension, Turner fails to present even a prima facie case of discrimination. Turner's attempts to cite examples of other Caucasian fire fighter who were not disciplined for other offenses is also of little probative value given that Turner occupied the highest position attainable when accusations were made against him. Thus, it is not surprising that the Board refused to ignore the serious allegations in Judge Walker's opinion in light of Turner's position within the department.

Plaintiff's counsel is correct in pointing out that racial discrimination claims must often be based upon circumstantial evidence given that a defendant will rarely admit that race played a factor in an adverse decision. The

Court agrees but nevertheless fails to see how any of the evidence cited by Turner even circumstantially proves racial discrimination. In light of Judge Walker's decision, which neither this Court nor a jury is in a position to second guess,[3] and state law governing investigations by the Board, the Court has seen no evidence to suggest that the Board's proffered reasons for its actions are pretextual.

In sum, there is no genuine issue of fact to be tried and defendants are entitled to judgment as a matter of law.

Accordingly;

IT IS ORDERED that the **Motion for Summary Judgment (Rec. Doc. 111)** filed by the Houma Municipal Fire & Police Civil Service Board, Pat McKey, Timothy Wallace, Johnny Lopez, Joe Roy, David Falgoust, and Craig Landry should be and is hereby **GRANTED.** Plaintiff's complaint is **DISMISSED WITH PREJUDICE.**

New Orleans, Louisiana, this **29th** day of AUGUST, 2002.

/s/ Jay C. Zainey
JAY C. ZAINEY
UNITED STATES DISTRICT JUDGE

---

[3] The Court is cognizant of the fact that Turner was not a party to the state court proceeding that produced the Walker decision. The Court does not see how that fact would make the Board's decision to investigate Turner any less plausible in light of the serious allegations contained in the decision.

(2)

No. 03-367

Supreme Court, U.S.
FILED
OCT 10 2003
OFFICE OF THE CLERK

In The Supreme Court of the United States

DANIEL TURNER,

Petitioner,

v.

HOUMA MUNICIPAL FIRE AND POLICE CIVIL SERVICE BOARD, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS

C. BERWICK DUVAL, II
Counsel of Record
WILLIAM S. WATKINS
STANWOOD R. DUVAL
DUVAL, FUNDERBURK, SUNDBERY, LOVELL & WATKINS
101 Wilson Avenue
Post Office Box 3017
Houma, LA 70361
(985) 876-6410
Counsel for Respondents Houma Municipal Fire and Police Civil Service Board, Pat McKey, Timothy Wallace, Johnny Lopez, Joe Roy, David Falgoust, and Craig Landry

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

16 11

LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT BELOW

Daniel Turner – petitioner

Houma Municipal Fire and Police Civil Service Board – respondent

Pat McKey – respondent

Timothy Wallace – respondent

Johnny Lopez – respondent

Joe Roy – respondent

David Falgoust – respondent

Craig Landry – respondent

TABLE OF CONTENTS

Page

List of All Parties to the Proceeding in the Court Below i

Table of Contents ii

Table of Cited Authorities iii

Reasons for Denying the Writ 1

I. The Fifth Circuit's decision in this case does not conflict with this Court's decisions in *Parratt v. Taylor* and *Hudson v. Palmer* 1

II. This case does not present an important issue of federal law 2

III. This case does not present a split among the circuits 3

A. Petitioner has disguised his challenge to a factual finding of the Court of Appeals as a split among the circuits 3

B. Even if Petitioner admitted that he is challenging a factual finding, the record contains undisputed evidence to support the Court of Appeals' factual finding 6

Conclusion 11

TABLE OF AUTHORITIES

Page

CASES:

Adams v. Sewell, 946 F.2d 757 (11th Cir. 1991), *overruled on other grounds by McKinney v. Pate,* 20 F.3d 1550 (11th Cir. 1994), *cert. denied sub nom. McKinney v. Osceola County Bd. of County Comm'rs,* 513 U.S. 1110, 115 S.Ct. 898, 130 L.Ed.2d 783 (1995) 4, 5

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) 6

Cathey v. Guenther, 47 F.3d 162 (5th Cir. 1995) 4

Hudson v. Palmer, 468 U.S. 517, 104 S.Ct. 3194 (1984) 1, 2, 3, 4

Levenstein v. Salafsky, 164 F.3d 345 (7th Cir. 1998) 4, 5

Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908 (1981) 1, 2, 3, 4

Ryan v. Illinois Department of Children and Family Services, 185 F.3d 751 (7th Cir. 1999) 4, 5

STATUTES:

42 U.S.C. § 1983 ..... 1, 4

La.R.S. 33:2501 9

La.R.S. 33:2501E.(1) 9, 10

La.R.S. 33:2501E.(2) 10

TABLE OF AUTHORITIES – Continued

Page

RULES:

Rule 12(b)(6), Fed.R.Civ.P. 5

Rule 56(e), Fed.R.Civ.P. 3, 6

5th Cir. R. 47.5.1 2

5th Cir. R. 47.5.4 2

S.Ct. R. 10 3

REASONS FOR DENYING THE WRIT

I. THE FIFTH CIRCUIT'S DECISION IN THIS CASE DOES NOT CONFLICT WITH THIS COURT'S DECISIONS IN *PARRATT v. TAYLOR* AND *HUDSON v. PALMER*.

Petitioner has failed to set out a cogent argument for the single question that the Petition presents for review: whether the decision of the Fifth Circuit Court of Appeals is "contrary to this Court's holding in *Parratt*." Pet. at *i*. He argues that *Parratt* does not apply to this case, Pet. at 18, then predicts that "the viability of *Parratt* will be called into question" if this Court does not grant the Petition. Pet. at 22.

Nothing in the Fifth Circuit's decision conflicts with or is contrary to *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908 (1981), or *Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984). In *Parratt*, this Court held that a state actor's negligent deprivation of property does not give rise to a procedural due process claim under 42 U.S.C. § 1983 where the deprivation was random and unauthorized, and the state provided an adequate post-deprivation remedy. In *Hudson*, this Court extended *Parratt* to apply to intentional deprivations of property.[1] In affirming summary judgment against Petitioner's procedural due process claim, the Fifth Circuit relied on the fact that "Turner failed to pursue fully the remedies available

[1] Although the Petition frames the issue in this case in terms of *Parratt* alone, Respondents submit that *Hudson* actually controls the outcome in this case. Based on Petitioner's allegations of pervasive racial bias, the deprivation in this case, if any, could be construed only as intentional.

to him in the state court system," citing *Parratt* and *Hudson* App. A-2. This holding does not conflict with the *Parratt/Hudson* doctrine, which bars procedural due process claims for deprivation of property where the state provides a meaningful post-deprivation remedy. The fact that Louisiana provides a meaningful post-deprivation remedy, standing alone, bars Petitioner's claim under *Parratt/Hudson*. The Fifth Circuit implicitly acknowledged that Louisiana provides such a remedy when it stated that Petitioner failed to pursue fully those remedies. App. A-2.

As discussed infra in § III.A., Petitioner's real disagreement is with the Fifth Circuit's finding as a matter of fact that he failed to pursue to completion available state remedies.

II. THIS CASE DOES NOT PRESENT AN IMPORTANT ISSUE OF FEDERAL LAW.

The Fifth Circuit issued its four-paragraph, *per curiam* decision in this case as an unpublished opinion, which that Court defines as an opinion that "merely decide[s] particular cases on the basis of well-settled principles of law." 5th Cir. R.47.5.1. The circuit court's rules also provide that an unpublished opinion is not precedent except under extremely narrow circumstances not present here.[2] The panel devoted only two sentences

[2] 5th Cir. R. 47.5.4 provides that unpublished opinions are "not precedent, except under the doctrine of res judicata, collateral estoppel or law of the case (or similarly to show double jeopardy, abuse of the writ, notice, sanctionable conduct, entitlement to attorney's fees, or the like)."

(and three citations, including *Parratt* and *Hudson*) to Petitioner's procedural due process claim.

Petitioner boldly argues that "the viability of *Parratt* will be called into question" if this Court does not grant the Petition. Pet. at 22. Such an overstatement cannot mask the fact that the decision in this case will not guide any court, including the Fifth Circuit, in deciding claims of future litigants. This case simply does not involve an important issue of federal law.

Construed in the light most favorable to Petitioner, this case would present nothing more than an example of "erroneous factual findings or the misapplication of a properly stated rule of law." This Court's rules recognize that such circumstances rarely support the grant of *certiorari*, S.Ct. R. 10.

III. THIS CASE DOES NOT PRESENT A SPLIT AMONG THE CIRCUITS.

A. Petitioner has disguised his challenge to a factual finding of the Court of Appeals as a split among the circuits.

The Fifth Circuit made a specific factual finding that "Turner failed to pursue fully the remedies available to him in the state court system." App. A-2.[3] The Fifth Circuit followed that factual finding with a legal conclusion: "Accordingly, Turner may not now seek relief from the

[3] This finding was appropriate in the summary judgment context, Rule 56(e), Fed.R.Civ.P., because Petitioner did not contest Respondents' factual assertion that Petitioner had failed to prosecute his appeal of either suspension.

federal courts. *Cathey v. Guenther,* 47 F.3d 162, 164 (5th Cir. 1995) (citing *Hudson v. Palmer,* 468 U.S. 517, 533 (1986); *Parratt v. Taylor,* 451 U.S. 527, 541-42 (1981))."

Turner attempts to dress up the Fifth Circuit's factual finding – that he failed to exhaust state remedies – in the clothing of a circuit court split on the issue of whether a plaintiff may escape the strictures of *Parratt/Hudson* and pursue a procedural due process claim in federal court by attempting to show that he was provided only a "sham" administrative proceeding. The Fifth Circuit's holding in this case does not present a difference of opinion among the circuits. It represents nothing more than a court's acceptance of and reliance on an undisputed material fact in the summary judgment context.

Petitioner suggests a circuit split based on two decisions of the Seventh Circuit, *Ryan v. Illinois Department of Children and Family Services,* 185 F.3d 751 (7th Cir. 1999), and *Levenstein v. Salafsky,* 164 F.3d 345 (7th Cir. 1998), and one decision of the Eleventh Circuit, *Adams v. Sewell,* 946 F.2d 757 (11th Cir. 1991), *overruled on other grounds by McKinney v. Pate,* 20 F.3d 1550 (11th Cir. 1994), *cert. denied sub nom. McKinney v. Osceola County Board of County Commissioners,* 513 U.S. 1110, 115 S.Ct. 898, 130 L.Ed.2d 783 (1995). These cases simply do not conflict with the Fifth Circuit's holding in this case, nor do they stand for the precise argument that Petitioner espouses in this Court.

In *Ryan v. Illinois Department of Children and Family Services, supra,* two former state employees sued under § 1983, claiming they were fired for speaking out about problems in their workplace. Plaintiffs argued that their post-termination hearings were a sham because the

responsible officials had already decided to fire them and therefore the hearings would be only a phony opportunity to contest the charges. The Seventh Circuit reversed summary judgment for the employer, holding that a "plaintiff who can introduce evidence that the decision has already been made and any hearing would be a sham is entitled to go forward with a procedural due process claim." 185 F.3d at 762. In *Levenstein v. Salafsky,* 164 F.3d 345 (7th Cir. 1998), the plaintiff professor alleged in his § 1983 suit that the procedures the university defendants used in forcing him to resign were a sham – the equivalent of no procedures – and that the decisionmakers had decided his guilt in advance. The Seventh Circuit held that plaintiff's allegations were enough to survive a motion to dismiss under Rule 12(b)(6), Fed.R.Civ.P., and that "when the procedures used to investigate the charges are a sham through and through, there has not been a constitutionally sufficient opportunity to respond." 164 F.3d 345, 351.

The Eleventh Circuit addressed sham post-termination procedures in *Adams v. Sewell, supra.* The plaintiff in *Adams,* a former county employee, claimed that his post-discharge hearing was "a sham from beginning to end." 946 F.2d at 765. The Eleventh Circuit found that "the pre-termination problems were not 'cured' by the post-termination hearing, and reasonable jurors could find that the pre- and post-termination procedures provided by the County were inadequate." 946 F.2d at 766.

These three holdings of the Seventh and Eleventh Circuits are factually distinguishable from this case, and the issue addressed by those two circuits – the effect of sham post-termination proceedings – was simply not addressed by the Fifth Circuit in this case. The circumstances of this case are entirely distinguishable from the

Seventh and Eleventh Circuit cases. Here, Turner took no more than the initial step in prosecuting either appeal to *state district court*, an entity that is entirely separate from the Board that Petitioner alleged had racial motives. One can only surmise at this point that the state court might have granted Petitioner relief, especially in light of the fact that Petitioner alleged no bias on the part of anyone connected with the state court system, and that he received relief via mandamus from the state court on his later-abandoned appeal of his first suspension.

There is simply no conflict among the decisions of the circuit courts and the Petition should be denied.

B. Even if petitioner admitted that he is challenging a factual finding, the record contains undisputed evidence to support the Court of Appeals' factual finding.

The Fifth Circuit's factual finding that "Turner failed to pursue fully the remedies available to him in the state court system," App. A-2, was appropriate, based on the undisputed evidence in the record. Rule 56(e), Fed.R.Civ.P.; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986).

Petitioner claims that he "was never able to appeal the adverse decision [of the Board in January 1998 to suspend him] to the district court," Pet. at 12,[4] and that

---

[4] Petitioner argues to this Court that both of the administrative hearings (one which produced a 30-day suspension, the other a 70-day suspension) were a "sham." Yet by his own stipulation in the district court and the court of appeals, any due process claim based on the first

(Continued on following page)

the Board "totally disregarded Petitioner's appeal" of the Board's second suspension in 1999. Pet. at 16. But the record confirms that – as to both suspensions – Petitioner voluntarily ceased his efforts to pursue available administrative remedies and did not prosecute either appeal to a final decision.

The 30-day suspension

As to the first suspension, the Petition states:

> Petitioner requested that McKey forward to the district court 'a certified transcript of the record, or written findings of fact, and all papers on file in the office of the board pertaining to Chief Turner's suspension . . . ' On May 22, 1998, Petitioner, after the passage of approximately four months and no response from defendant McKey, or the Board's attorney, filed a Petition for Writ of Mandamus. In a decision dated December 16, 1998, Judge Pettigrew ruled in favor of Petitioner, ordering the Board to 'forward a certified transcript of the record, or written findings of fact, and all papers on file in the office of the board pertaining to Chief Turner's suspension to the District Court. The court also awarded Petitioner costs, together with attorney's fees in the amount of $500.00. Respondents disregarded the

---

suspension is barred by Louisiana's statute of limitations (prescription). *See* district court's Order and Reasons entered August 30, 2002, App. C-3 at n.1: "Turner conceded that any claims with respect to the 30 day suspension in 1998 are prescribed." Petitioner affirmed this stipulation in his original brief in the Fifth Circuit at 27: "As undersigned counsel stipulated during oral argument on defendants' motion for summary judgment, the claim pertaining to the January 6, 1998 hearing has prescribed."

> court's order. Respondent never forwarded a certified transcript of the record, or written findings of fact, and all papers on file in the office of the board pertaining to Chief Turner's suspension to the district court. Due to Respondent's recalcitrance, Petitioner was never able to appeal the adverse decision to the district court.
>
> Pet. at 11-12

But Petitioner fails to inform this Court that, on July 9, 1998, Respondents filed into state court both of the documents that the state court judge ordered the Board to file with the district court. Those two documents are entitled "Return" (which contains a list of "all of the documents in the possession of the City of Houma Municipal Fire and Police Civil Service Board concerning the hearing requested by Oswald Stoufflet which resulted in disciplinary action against Daniel Turner") and "Findings of Fact and Conclusions of Law." Attached to the latter document is a copy of a July 8, 1998 transmittal letter from counsel for the Board to counsel for Petitioner, which indicates that it was sent by fax and by regular mail. That letter states:

> Dear Mr. Wilson:
>
> Enclosed is a copy of the Findings of Fact and Conclusions of Law of the City of Houma Municipal Fire and Police Civil Service Board concerning the hearing requested by Oswald Stoufflet.
>
> On July 8, 1998 all documents of the Civil Service Board concerning this matter were filed with the Clerk of Court.

The two documents, as well as the July 8, 1998 transmittal letter, were attached as Exh. "L" to Respondents' motion for summary judgment, rec.doc. 73, and are part of the summary judgment record. Unfortunately, both documents bore the caption and docket number of Mr. Turner's suit for injunctive relief, *Daniel Turner v. Houma Municipal Fire and Police Civil Service Board,* No. 121384 (32nd Judicial District Court, Parish of Terrebonne), and were filed into the record of that suit, instead of into Petitioner's mandamus action, *Daniel Turner v. Houma Municipal Fire and Police Civil Service Board,* No. 122369 (32nd Judicial District Court, Parish of Terrebonne). Both of those identically-named suits were pending in the same court at the same time. But regardless of Respondents' clerical mistake in listing the wrong docket number on the caption of the two documents, the record indicates (and Petitioner failed to controvert) that both documents were faxed and mailed to Petitioner's counsel simultaneously with the court filing.

Armed with the foregoing two documents, Petitioner could have filed suit under La.R.S. 33:2501 in state district court challenging the January 1998 suspension. But the uncontroverted summary judgment record shows that he failed to do so.[5] Nothing in the record supports Petitioner's self-serving claim that he "was never able to appeal" the first suspension. Pet. at 12.

---

[5] La.R.S. 33:2501E.(1) provides that any classified civil service employee "may appeal from any decision of the board, or from any action taken by the board under the provisions of the Part that is prejudicial to the employee. . . . This appeal shall lie direct to the court of original and unlimited jurisdiction in civil suits of the parish wherein the board is domiciled."

The 70-day suspension

With regard to his second suspension, Petitioner alleges:

> On March 9, 1999 Petitioner addressed and mailed two certified letters to Respondent McKey, appealing the Board's decision. Petitioner never received a response from the Board. The Board has totally disregarded Petitioner's appeal.
>
> Pet. at 16

Whether the Board "totally disregarded" Turner's appeal of his second suspension is of no moment. Even if the Board disregarded Petitioner's appeal, the evidence is uncontroverted that he took no steps beyond sending the Board two letters in the prosecution of his appeal of the second suspension. Indeed, the appeal was never lodged in state court, as contemplated by La.R.S. 33:2501E.(1). Petitioner implicitly suggests that the Board failed to comply with La.R.S. 33:2501E.(2), which requires that it file the transcript of the hearing with the district court after receipt of a notice of appeal. If so, Petitioner still failed to complete the appeal of his second suspension. With regard to his first suspension, Petitioner obtained mandamus relief, including an award of attorney's fees, directing that the Board comply with its statutory obligation to file a hearing transcript with the district court. His failure to take the same step with his second appeal bars his procedural due process claim.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

C. BERWICK DUVAL, II
Counsel of Record
WILLIAM S. WATKINS
STANWOOD R. DUVAL
DUVAL, FUNDERBURK, SUNDBERY,
LOVELL & WATKINS
101 Wilson Avenue
Post Office Box 3017
Houma, LA 70361
(985) 876-6410

Counsel for Respondents
Houma Municipal Fire and
Police Civil Service Board,
Pat McKey, Timothy Wallace,
Johnny Lopez, Joe Roy,
David Falgoust, and
Craig Landry